



1 face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). *Id.* Otherwise,  
2 defendants must produce evidence proving failure to exhaust in a motion for summary judgment  
3 under Rule 56. *Id.* Defendants must present probative evidence that there was an available  
4 administrative remedy and that the prisoner did not exhaust that available administrative remedy.  
5 *Id.* at \*5, \*8.


6 On April 14, 2014, defendants filed a notice and request to convert their Rule 12(b)  
7 motions into motions for summary judgment. However, out of an abundance of caution, as a  
8 matter of clarity, and to ensure that plaintiff understands the difference between a Rule 12(b)  
9 motion and a motion for summary judgment, defendants' request to convert their motions is  
10 DENIED.

11 In view of *Albino*, defendants' motions (docket nos. 25, 55) to dismiss plaintiff's instant  
12 prisoner action under the unenumerated portion of Rule 12(b) for failure to exhaust available  
13 administrative remedies, as required by the PLRA, are DENIED. These denials are without  
14 prejudice to defendants renewing their failure to exhaust defense in a motion for summary  
15 judgment, if appropriate.

16 In order to expedite these proceedings, defendants must serve and file a motion for  
17 summary judgment (whether or not they choose to raise a failure to exhaust defense) within 60  
18 days of this order. Plaintiff must serve and file an opposition or statement of non-opposition to  
19 the motion not more than 28 days after the motion is served and filed, and defendants must serve  
20 and file a reply to an opposition not more than 14 days after the opposition is served and filed.

21 IT IS SO ORDERED.

22 DATED: 5 / 2 / 14

23   
LUCY H. KOH  
United States District Judge